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Robert H. Corbin

February 12, 1987

Mr. Max Hawkins, Acting Director
Arizona Department of Administration
1831 West Jefferson
Phoenix, Arizona 85007

Re: I87-028 (R87-032)

Dear Mr. Hawkins:

The assistant director of the personnel division has asked, on your behalf, the following questions:

1. Are state employees permitted to circulate and/or sign a petition to recall a state officer?
2. Are state employees permitted to wear a badge/button that promotes or supports the recall of a state officer.
3. May state employees display a bumper sticker that promotes or supports the recall of a state officer on a personal vehicle that is used in the conduct of state business?
4. May state employees display a bumper sticker that promotes or supports the recall of a state officer on a personal vehicle not used in the conduct of state business but parked on state property?

We conclude that as a general rule, state employees^{1/} may engage in all of the listed activities you describe, except they may not circulate a recall petition.

A.R.S. § 41-772 provides in pertinent part:

B. No employee or member of the personnel board may be a member of any national, state or local committee of a political party, or an officer or chairman of

^{1/}A "state employee" includes only those persons holding positions in state service. See A.R.S. §§ 41-762 and 41-771.

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a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinion, attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his vote.

. . . .

E. Nothing contained in this section shall be construed as denying any employee or board member his civil or political liberties as guaranteed by the United States and Arizona Constitutions.

(Emphasis added.) This statute is similar to the federal Hatch Act, 5 U.S.C. § 7324.^{2/}

^{2/}5 U.S.C. 7324 provides in pertinent part:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not -

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(Emphasis added.)

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Your first question regarding circulation or signing of a recall petition was addressed in Ariz. Atty. Gen. Op. 78-26 as follows:

We will first deal with the issue of a state employee who circulates a recall petition of a state officer. In our opinion, such activity constitutes taking part in a political campaign, which A.R.S. § 41-772 prohibits. Such an employee is taking affirmative action for the purpose of influencing public opinion and ultimately, a public election, and this is the essence of a "political campaign." We do not read the proscription of A.R.S. § 41-772.B. as being limited to a "political campaign" of an individual running for election for a specific office. The words themselves suggest a much broader scope, including any organized effort to promote a cause or secure some result through the political process. See State ex rel. Green v. City of Cleveland, 33 N.E.2d 35 (Ohio App. 1940).

However, we think A.R.S. § 41-772 does not prohibit a state employee from signing a recall petition. The proscription of A.R.S. § 41-772 is aimed at active political activity by state employees. Subsection B. of that provision expressly reserves the right to vote to state employees, and to express an opinion. The signing of a petition is highly analogous to voting, i.e., it is a written expression of an opinion about a person which has legal and political significance. This fact, coupled with the well established doctrine that governmental restrictions on first amendment freedoms should not be broader than is necessary to accomplish a constitutionally permitted goal, persuades us that A.R.S. § 41-772 does not proscribe signing recall petitions. See Huerta v. Flood, 103 Ariz. 609, 611[, 447 P.2d 866, 868] (1968).

(Emphasis in original.) A.R.S. § 41-772 has not been amended since issuance of that opinion and we reaffirm the conclusions

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reached in the opinion. State employees, therefore, may sign recall petitions, although they may not circulate them.

We turn now to your remaining questions regarding display of badges, buttons and bumper stickers advocating recall of a public officer. A.R.S. § 41-772 was adopted by Laws 1972 (2nd Reg. Sess.) Ch. 141, § 4 and contains language that is substantially similar to the Hatch Act, affirmatively providing for the right of an employee to "express his opinion." A.R.S. § 41-772(B); 5 U.S.C. § 7324(b).

Prior to Arizona's enactment of A.R.S. § 41-772, federal regulations implementing the Hatch Act had been adopted in 1970. 5 C.F.R. § 733.111 sets out permissible activities and includes the following:

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee remains the right to -

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge or button;

(Emphasis added.) These regulations have been upheld against a First Amendment Challenge. United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).^{3/}

^{3/}The question whether a state regulation prohibiting the display of political buttons or bumper stickers was unconstitutional was raised in Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Supreme Court declined to address the issue, however, because the parties before the Court were not charged with violation of that regulation. 413 U.S. at 609-610, 93 S.Ct. at 2914, 37 L.Ed.2d at 838.

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A.R.S. § 41-772 also protects an employee's civil and political liberties guaranteed by the United States and Arizona Constitutions. The United States Constitution, Amend. I, in pertinent part provides:

Congress shall make no law . . .
abridging the freedom of speech

Art. II, § 6 of the Arizona Constitution provides in pertinent part:

Every person may freely speak, write, and
publish on all subjects

The State may not prohibit or control conduct of a persons by infringing on constitutionally guaranteed freedoms and public employment may not be conditioned on a basis that infringes an employee's constitutionally protected right to freedom of expression. Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708, 716-717 (1983); Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629, 642 (1967).

Symbolic non-verbal acts, such as displaying buttons and bumper stickers, are closely akin to "pure speech", entitled to comprehensive protection under the First Amendment. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969) (armbands); Smith v. United States, 502 F.2d 512, 516 (5th Cir. 1974) (button); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) (bumper sticker). The Federal District Court for the Southern District of Ohio granted a preliminary injunction reinstating postal employees who had been dismissed for wearing political tee-shirts and buttons stating:

At the outset we note that the language on plaintiff's buttons and tee-shirts is, for constitutional purposes, "pure speech." See Tinker v. Des Moines Community School District, 393 U.S. 503, 505-06, 89 S.Ct. 733, 735-36, 21 L.Ed.2d 731 (1969). As such it is entitled to the highest degree of protection available under the circumstances. Kucinich v. Forbes, 432 F.Supp. 1101, 1111 (N.D. Ohio 1977).

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Kelly v. United State Postal Service, 492 F.Supp. 121, 128
(D.C.S.D. Ohio 1980). The standards for restricting pure speech
are as follows:

As a general matter, to restrict "pure
speech" the government must show that:

(1) a clear and present danger is
presented by the pure speech,

(2) the individual's interest in
expressing himself is outweighed by the danger
from allowing the pure speech, and

(3) the government has used the narrowest
restriction on pure expression consistent with
the furtherance of the governmental interest
involved.

492 F.Supp. at 128-129. If the government can meet this
stringent test, then it may restrict the time, place, and
manner, but not the content of speech. 492 F.Supp. at 130. The
court in Kelly concluded as follows:

To disagree with, and indeed be offended by
the messages carried by plaintiffs' buttons
and tee-shirts are certainly valid feelings.
But to take action against plaintiffs because
of the political ideas they espouse is clearly
unlawful and just as clearly unpatriotic. For
to punish those that endorse unpopular ideas
is to punish the individualism and pluralism
that have given the United States the strength
to carry on its democratic government. Along
with their right to speak and believe as they
please all Americans have the responsibility
to tolerate the speech and beliefs of those
they disagree with. If we do not practice
such tolerance we will become something less
than a free and independent people.

492 F.Supp. at 131.

The Federal District Court for the District of Columbia
invalidated a Veteran's Administration policy which prohibited
all employees from wearing political buttons while on duty.

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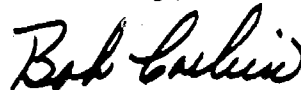
American Federation of Government Employees, AFL-CIO v. Pierce, 586 F.Supp. 1559 (D.C.D.C. 1984). The Fifth Circuit struck down a city charter and ordinance which, as applied, prohibited city employees from displaying bumper stickers, stating:

There being no intimation of a compelling state interest for the blackout of a fireman's bumper sticker, the resulting infringement upon political activity is unjustified.

Hobbs v. Thompson, 448 F.2d 456, 475 (5th Cir. 1971).

Therefore, as a general rule, because of the language in A.R.S. § 41-772(B) and (E) guaranteeing constitutional rights and the right to express an opinion, and because our statute was adopted from the federal statute which was interpreted in federal regulations to permit public expression of a political opinion and display of political badges, stickers and buttons, we think A.R.S. § 41-772 permits state employees to express an opinion advocating recall by wearing a political badge or button, or displaying a bumper sticker on any personal vehicle.

Sincerely,



BOB CORBIN
Attorney General

BC:JGF:gm